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In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

PACIFICA FOUNDATION, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Federal Communications Commission petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 556 F. 2d 9 (Pet. App. A, 1–62).[1] The opinions of the Federal Communications Commission are reported at 56 FCC 2d 94, and 59 FCC 2d 892 (Pet. App. B, 63–92 and C, 93–96).

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1977 (Pet. App. D, 97–98). A timely petition for rehearing was denied on May 10, 1977 (Pet. App. E, 99, 100).

[1] The appendices are separately presented in a companion volume and cited as "Pet. App."

An extension of time within which to file a petition for a writ of certiorari to and including October 7, 1977 was granted by the Chief Justice on August 5, 1977. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1), and 28 U.S.C. § 2350(a).

QUESTIONS PRESENTED

1. Whether the broadcast medium's unique qualities and the requirement that broadcasters program in the public interest distinguish broadcasting from other modes of expression so as to warrant giving meaning, for purposes of regulatory action, to the prohibition of indecency in 18 U.S.C. § 1464 at times when there is a strong probability that unsupervised children are in the audience.

2. Whether the FCC correctly found that language broadcast in the early afternoon which described in a patently offensive manner sexual and excretory activities and organs was indecent within the meaning of 18 U.S.C. § 1464.

STATUTES INVOLVED

Section 1464 of Title 18 of the United States Code, 62 Stat. 769, 18 U.S.C. § 1464 provides:

> Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Sections 312(a)(6), 312(b)(2), and 503(b)(1)(E) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 312(a)(6), 312(b)(2), and 503(b)(1)(E), are reproduced at Pet. App. F, 101–102).

STATEMENT

This case grows out of a continuing effort of the Federal Communications Commission to clarify the standard used to decide whether and under what circumstances broadcast language is "indecent" within the meaning of 18 U.S.C. § 1464. Although criminal prosecution under this section is solely within the jurisdiction of the Department of Justice, Congress has also given the Commission certain enforcement obligations

with respect to Section 1464. Thus, the Commission, upon finding a violation of Section 1464, is specifically empowered to revoke a station's license, 47 U.S.C. § 312(a)(6), or to issue a cease and desist order, 47 U.S.C. § 312(b)(2), or to impose a monetary forfeiture, 47 U.S.C. § 503(b)(1)(E). (See Pet. App. F, 101–102).

In a declaratory order which followed a citizen's complaint, the Commission attempted to give specific meaning to the Congressional prohibition against broadcasting "indecent" language. (Pet. App. B, 63–92). At the heart of the Commission's concern was exposure of children to language describing sexual or excretory activities and organs in words that are considered patently offensive as measured by contemporary community standards for the broadcast medium. (Pet. App. B, 70–71).

1. The Commission's declaratory order responded to a complaint from a father in New York City concerning language broadcast by a local radio station. The complainant stated that he and his young son had heard a broadcast during the early afternoon hours which contained such words as "cocksucker," "fuck," "cunt," and "shit." He labeled the material "garbage" and expressed concern that it had been aired at a time when children, including his son, heard it. (Pet. App. B, 64–65).

An inquiry to the station licensee, the Pacifica Foundation, established that it had broadcast a pre-recorded comedy monologue of approximately 12 minutes duration. This monologue was found by the Commission to be

> almost wholly devoted to the use of such words as "shit" and "fuck," as well as "cocksucker," "motherfucker," "piss," and "cunt." The comedian begins by stating that he has been thinking about "the words you couldn't say on the public . . . airwaves . . . the ones you definitely couldn't say . . ." Thereafter, there is repeated use of the words "shit" and "fuck" in a manner designed to draw laughter from his audience. (Pet. App. B, 65).

A verbatim transcript of the recording is reproduced in the Appendix. (Pet. App. B, 58–62; 74–79).

In responding to the complaint, the station asserted that the recorded selection was broadcast at the conclusion of an

analysis of the use of language in contemporary society and that it constituted "an incisive satirical view of the subject under discussion." The station did not respond to the complainant's concern that this language was broadcast at a time when young children would undoubtedly have heard it. Nor did the station explain how the broadcast of the language under these circumstances was consistent with its earlier pledge to the FCC that it would remain "sensitive to its responsibilities to its listening audience and carefully schedule for late night broadcasts those programs which may be misunderstood by children although thoroughly acceptable to an adult audience." (Pet. App. B, 65–67, n.1, n.5).

2. In carrying out its mandate to promote the larger and more effective use of radio in the public interest, 47 U.S.C. § 303(g), and in enforcing 18 U.S.C. § 1464 through regulatory actions, the Commission has identified separate and distinct standards to determine whether material broadcast is obscene or indecent. In 1970, the Commissioner focused upon "indecency" in *Eastern Educational Radio (WUHY–FM)*, 24 FCC 2d 408 (1970). It found that the words "fuck" and "shit" were used gratuitously and repeatedly throughout the broadcast and that "(t)his (language) fosters no debate, serves no social purpose, and would drastically curtail the usefulness of radio for millions of people." 24 FCC 2d at 415. In the Commission's judgment such words in themselves did not appeal to the prurient interest of listeners and, therefore, were not obscene under the *Roth-Memoirs* test.[2] Accordingly, the Commission relied on the indecency prohibition in Section 1464. A crucial consideration was the probable presence of children in a radio audience:

> No one could ever know, in home or car listening, when he or his children would encounter what he would regard as the most vile expressions serving no purpose but to shock, to pander to sensationalism. 24 FCC 2d at 411.

The Commission acknowledged that it was acting in a particularly sensitive constitutional area and stated that it would

[2] *Roth* v. *United States*, 354 U.S. 407 (1957); *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966).

welcome judicial review. The station did not seek judicial review.

Sonderling Broadcasting Corp., 27 Pike & Fischer Radio Reg. 2d 285, *recon. denied*, 41 FCC 2d 777 (1973), involved the broadcast of a program containing explicit descriptions of oral sexual acts. In finding this material "obscene" and "indecent," the Commission again pointed to the unique pervasive qualities of radio, and the fact that children were in the broadcast audience. *Sonderling* was affirmed in *Illinois Citizens Committee* v. *FCC*, 515 F. 2d 397 (D.C. Cir. 1975). While the Court based its opinion solely upon the obscenity finding and did not reach the alternative finding that the material was indecent, it clearly recognized the relevance of the presence of children in the audience. 515 F. 2d 397, 404.

3. In the declaratory order under review (Pet. App. B, 63–92), the Commission acknowledged the statutory prohibition against censorship or interference with the right of free speech by means of radio communication. 47 U.S.C. § 326. However, it noted that Section 326 of the Communications Act was qualified by the prohibition against the broadcast of indecent language, which originally had been a part of Section 326 (Pet. App. B, 67), and later was transferred to 18 U.S.C. § 1464. The FCC said that broadcasting's uniquely intrusive qualities warranted a different First Amendment analysis from that applicable to books, newspapers, and ordinary speech. Among the distinguishing characteristics identified by the Commission are: children have easy access to radios and in many cases are unsupervised by parents in their use of the radio; radio receivers are in the home, a place where an individual's privacy interest is entitled to particular deference; the government must license and regulate the use of spectrum space in the public interest. (Pet. App. B, 68–69). In addition, the Commission found that its action was justified by its statutory obligation to promote the larger and more effective use of radio in the public interest. 47 U.S.C. § 303(g). The Commission feared the widespread use of indecent language on the public's airwaves resulting in the impairment of broadcasting as an effective mode of communication for all and the exposure of nonconsenting recipients, especially children, to indecent language. (Pet. App. B, 73).

The Commission's analysis is perhaps best summarized in the following passage from its opinion:

> . . . it is important to make it explicit whom we are protecting and from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See *Wisconsin* v. *Yoder*, 406 U.S. 206, 214 (1972), and cases cited therein. Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.*

*Pacifica stated in 1964 when it sought license renewal that "it is sensitive to its responsibilities to its listening audience and carefully schedules for late night broadcasts those programs which may be misunderstood by children although thoroughly acceptable to an adult audience."

(Pet. App. B, 70–71).

When the danger of exposure to children in the audience is reduced to a minimum, the Commission suggested that "a different standard might conceivably be used." The definition of indecent would remain the same; but the Commission would consider whether the matter broadcast, despite the use of offensive language, had serious literary, artistic, political or scientific value when considered as a whole. (Pet. App. B, 71). The Commission narrowed its holding to the particular complaint before it, concluding that the language was patently offensive by contemporary community standards for the broadcast medium.[3]

[3] The Commission concluded: ". . . words such as 'fuck', 'shit', 'piss', 'motherfucker', 'cocksucker', 'cunt' and 'tit' depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464." (Pet. App. B, 72).

On reconsideration the Commission again emphasized that it did not intend to place an absolute ban on the broadcast of offensive language, "but rather sought to channel it to times of day when children most likely would not be exposed to it." (Pet. App. C, 94).

4. Pacifica sought review of the Commission's order, invoking the jurisdiction of the D.C. Circuit Court of Appeals pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342. A sharply divided panel of the court reversed the Commission's decision "(w)ithout deciding the perplexing question of whether the FCC, because of the unique characteristics of radio and television, may prohibit non-obscene speech or speech that would otherwise be constitutionally protected. . . ." (Pet. App. A, 2). The majority opinion recognized that the indecency provision of 18 U.S.C. § 1464 has never been "authoritatively construed" by the courts (Pet. App. A, 11–12) and left open the possibility that "obscene" and "indecent" have distinct meanings in the broadcast medium.[4] The majority only agreed that the Commission's order was overbroad and vague in violation of the no-censoring provision of 47 U.S.C. § 326. (Pet. App. A, 18, 19–20). The dissent agreed with the Commission's indecency finding on the specific facts of this case. (Pet. App. A, 43–57).

The Commission suggested rehearing en banc, asking the full court to decide the important issue of whether indecent in Section 1464 has a different meaning from obscene, and the specific question whether the Commission had correctly found the language as broadcast indecent. Four of the nine circuit judges voted for rehearing. (Pet. App. E, 99).

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the questions presented by this case require a reconciliation of conflicting con-

[4] A concurring judge in the majority did conclude that indecent did not have a separate meaning from obscene, taking the position that only hard core pornography falling within this Court's test in *Miller* v. *California*, 413 U.S. 15 (1973), was prohibited from the airwaves by Section 1464. (Pet App. A, 19–42).

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stitutional interests as pointed out by Judge Leventhal in his dissent below. (Pet. App. A, 43–57). Correct resolution of these questions is of paramount importance to the Federal Communications Commission, but more important to broadcasters and to the public. While the court below was sharply divided, its opinion—together with a later opinion by another Federal Court [5]—would establish that only hard core pornography falling within the definition of *Miller* v. *California*, 413 U.S. 15 (1973), may be barred from broadcasting over the nation's airwaves by Section 1464. The FCC respectfully submits that this proposition is not compelled either by the Communications Act of 1934 or by this Court's past decisions. Moreover, such a proposition should not be finally established for the entire nation's broadcast medium until this Court has had a full opportunity to consider the conflicting interests identified by the FCC and Judge Leventhal in their opinions.

1. At its last term this Court once again recognized that free speech questions which arise in "the electronic broadcast medium . . . warrant special consideration." *Bates* v. *State Bar of Arizona*, 97 S. Ct. 2691, 2709 (1977). The FCC is obliged by the Communications Act to enforce by administrative action the obscenity and indecency prohibition of 18 U.S.C. § 1464. It must also insure that broadcasters program in the public interest. Congress, which in 1934 prohibited the FCC from engaging in "censorship" of broadcasting, also prohibited in the same section of the Communications Act the utterance of "obscene" or "indecent" language by means of radio communication. Congress enacted the following provision:

[5] In *United States* v. *Lewis Leonard Simpson*, — F. 2d — (No. 77-1108, 7th Cir., July 29, 1977), a federal court for the first time held that the obscene and the indecent in § 1464 are to be read as a single proscription. Slip op. 12. In reaching that conclusion the court assumed that this court would interpret the "indecent in § 1464 as it has in [18 U.S.C.] § 1462." (Slip op. 11). In a footnote the court wrote, "At some point the balance between the speaker and listener must tip in favor of the listener, but where that point is we need not decide, in view of our interpretation of the statute." Slip op. at p. 11, n. 8.

CENSORSHIP; INDECENT LANGUAGE

> SEC. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. *No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.* 48 Stat. 1064, 1091 (Emphasis added).

This prohibition against the broadcast of obscene or indecent language was later transferred to the criminal code, 18 U.S.C. § 1464. However, the Commission is specifically authorized to revoke broadcast licenses, issue cease and desist orders, and impose monetary forfeitures for violation of Section 1464. See 47 U.S.C. §§ 312(a)(6), 312(b)(2), and 503(b)(1)(E). The order under review was part of the FCC's continuing effort to furnish specific and narrow meaning to the Congressional prohibition against the broadcast of indecent language. At the heart of the agency's decision in this case was the recognition that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 213–214, citing among other cases *Ginsberg* v. *New York*, 390 U.S. 629 (1968), and *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970).[6] Thus, a parent like the complainant in this case may seek assistance from the Commission if a broadcaster which has been entrusted with a scarce public resource abuses that trust by broadcasting for nearly twelve minutes a record which repeats over and over words which depict sexual or excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium, at a time when children are in the audience.

[6] To a lesser extent the Commission also attempted to afford some protection to those unconsenting adults "who do not want the type of language broadcast in this case thrust into the sanctuary of their homes. *Cf. Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738 (1970)." (Pet. App. B, 72).

As Judge Leventhal observed, the government has the authority under the Constitution

> to assist parents in their protection of young children during the uniquely prolonged period of development needed to permit the emergence of a competent and consenting person, and to protect some privacy in the home and in residential and civic neighborhoods that are family areas of shared community space. The latter consideration is not priggishness, but reflects a value that Alexander Bickel identified . . . as society's concern with the quality of its community life. (Pet. App. A, 56)

The President's Commission on Obscenity and Pornography recognized that broadcasting is entitled to special consideration "should the need arise" because of "the possible thrusting of sexually explicit materials upon unwilling persons." [7]

That need has arisen in the 1970's as more and more complaints from the general public and Congress have compelled the FCC to act. See, *e.g.*, *WUHY-FM*, *supra*, 24 FCC 2d 408; *Sonderling Broadcasting Corp.*, *supra*, 41 FCC 2d at 778 & n. 6; *The Trustees of the University of Pennsylvania*, FCC 75-1333, December 4, 1975.[8] The FCC has attempted to adapt this

[7] *The Report of the Commission on Obscenity and Pornography* (Bantam Ed. (1970)), p. 73, n.11, made the following observation:

"The broadcasting or telecasting of explicit sexual material has not constituted a serious problem in the past. There is, however, a potential in this area for thrusting sexually explicit materials upon unwilling persons. Existing federal statutes imposing criminal and civil penalties upon any broadcast of 'obscene' material do not adequately address this problem because they do not describe with sufficient specificity what material would be prohibited, or under what conditions. Hence, the repeal of these statutes is recommended, upon the understanding that the Federal Communications Commission either already has, or can acquire through legislation, adequate power to promulgate and enforce specific rules in this area should the need arise."

[8] The logical extension of the abstract proposition that only hard core pornography can be barred from the nation's airwaves is dramatized by the transcript of some broadcasts on the University of Pennsylvania's educational station. Much of the material, while apparently indecent, could not be considered hard core pornography. On December 4, 1975, the Commission issued a notice of apparent violation of 18 U.S.C. § 1464. The Commission employed the indecency standard enunciated in the declaratory order challenged in this case. A copy of the notice to the University of Pennsylvania is included as an Addendum to this petition.

Court's decisions in other areas to the unique characteristics of the broadcasting medium. It has consistently encouraged judicial review of its actions in this sensitive area. The agency has always recognized that this Court would ultimately have to balance the conflicting interests. The FCC respectfully submits that the matter is now ripe for Supreme Court review.

2. In its declaratory order, the Commission indicated that "broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is scarcity of spectrum space, the use of which the government must therefore license in the public interest." (Pet. App. B, 69).

Congress, in enacting the Radio Act of 1927, 44 Stat. 1172, and its successor, the Communications Act of 1934, 48 Stat. 1064, recognized that the federal government would have a vital role in regulating the use of the limited radio spectrum. The inherent limitation imposes special obligations on broadcasters, and warrants closer government scrutiny of radio than would be appropriate for other media.

In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), this Court stated that radio communication posed unique problems not present in other free speech areas. The Court's conclusion rested upon its finding that broadcasting, unlike other publication, consumed scarce spectrum space,[9] a feature which

[9] It is sophistry to suggest as some have that radio frequencies are no longer scarce. In this regard, the Commission was recently notified that sale of an FM station in New York City, comparable to Pacifica's station, was contemplated for $2,500,000, a figure substantially in excess of the market value of its physical plant and good will. The difference is attributable to the value of its frequency.

would justify differences in the First Amendment standards applicable to broadcasters. Speaking for this Court, Mr. Justice White stated:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish. 395 U.S. at 388.

In 1973, the Court reaffirmed this position in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 101 (1973). There the Court said that because the broadcast media utilized a limited public resource, there was present "an unusual order of First Amendment values." More explicitly, in *United Church of Christ* v. *FCC,* 359 F. 2d 994, 1003 (D.C. Cir. 1966), the D.C. Circuit stated:

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise, it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owner; a broadcast station cannot. . . . [A] broadcast license is a public trust subject to termination for breach of duty.

The station licensee involved in this case, Pacifica, ignored its special obligations, claiming a right to be judged by the standard which might apply to a privately operated "adult" entertainment establishment and not the higher standard applicable to public trustees. *Cf. Lorain Journal* v. *FCC,* 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied,* 383 U.S. 967 (1966); *Yale Broadcasting* v. *FCC,* 478 F. 2d 594 (D.C. Cir. 1973), *cert. denied,* 414 U.S. 914 (1973).

Radio communication is also unique because it is directed indiscriminately toward the public. In a different way from other media of mass communication, it is both pervasive and intrusive. The passive act of listening to the radio is different, practically, socially and physically, from obtaining literature or gaining admission to a movie theatre. To gain access to risque literature or motion pictures, a consumer must enter a store or theatre and consciously choose to make a purchase.

Book store and movie theatre proprietors can exclude persons who are under age and thus reduce the likelihood that young children will be exposed to matters that are deemed unacceptable for their consumption. Furthermore, parents find it simple and natural to regulate the use of magazines, books and movies. Parents can and do segregate from the family library books considered unsuitable for children. Parents can and do monitor the movies their children must pay to see. But radio broadcasts are much more difficult for parents to supervise. Broadcasts are easily accessible to young persons even in the privacy of the home, without the need for comparable affirmative acts.

Thus, unlike a book store owner or theatre operator, a broadcast licensee cannot rely upon parental scrutiny as an effective means of sorting out and excluding youthful customers. Moreover, as is widely known in our society, television viewing and radio listening for young children are largely devoid of direct parental supervision. Although most parents attempt to monitor their children's viewing and listening habits—particularly during evening hours when parents themselves place heavy reliance on broadcast media to satisfy their entertainment needs—it is unrealistic to expect such close oversight all the time. During times when unsupervised children are probably in the audience, a broadcaster is obliged by 18 U.S.C. § 1464 and the public interest standard to recognize this fact and to program accordingly. A broadcaster should not force parents to accept the risk that children will be exposed to broadcasts of patently offensive words depicting sexual and excretory activities or organs.

The regulation of books and motion pictures on the one hand, and broadcast material on the other, can be distinguished on grounds other than that more affirmative acts are required to gain exposure to the former media. In order to *avoid* exposure to sexually offensive broadcast material, affirmative acts are required. This is a particularly important consideration when large numbers of unsupervised children are likely to be in the audience. Young children have neither the capacity to consent

nor the judgment to avoid what large numbers of parents believe would be inappropriate for them to see or hear.[10]

This Court has long recognized a special societal concern for protecting young children from sexually explicit materials. *Miller* v. *California*, 413 U.S. at 19; *Ginsberg* v. *New York*, 390 U.S. at 637–43. The concern is warranted not only by the State's interest, *parens patriae*, in the moral and emotional adjustment of children, but also as a recognition of the right of parents to rear their children according to their own best judgment. *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 213–4.

The Commission shaped its order to protect this interest, but at the same time to hold to a minimum the order's penumbral impact. The special interest in protecting children is reinforced in the radio context by the fact that a broadcast intrudes into the privacy of the home. This Court has consistently held that individual privacy is entitled to greater protection in the home than on the streets. See, *e.g.*, *Rowan* v. *Post Office*, *supra*. Accordingly, the Commission indicated that broadcasters must show "[a] decent respect for the right of those who want to be 'free from unwanted expression in the confines of one's home.'" (Pet. App. B, 72).

Pacifica placed primary reliance upon *Erznozik* v. *City of Jacksonville*, 422 U.S. 205 (1975), for the proposition that the Commission's order is constitutionally infirm. But even assuming *Erznozik* is applicable to the broadest medium, it clearly stated that selective restrictions on speech were permissible when

> The speaker intrudes upon the privacy of the home [citation omitted] or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. 422 U.S. at 209.

Radio communication presents not one but both of these special circumstances. Accordingly, the Commission's judg-

[10] "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 214 n.11 (1975), quoting *Ginsberg* v. *New York*, *supra*.

ment that the intrusive qualities of the medium require the channeling to appropriate time periods of patently offensive language depicting sexual and excretory activities and organs in the *narrow and precisely circumscribed context* where young, unsupervised children are likely to hear it in the privacy of the home was entirely reasonable.

3. In reversing the Commission's order, a panel of the D.C. Circuit could not agree. Chief Judge Bazelon concluded that "indecent" did not have a separate meaning from "obscene." Judge Tamm, the other member of the majority, recognized that up to that time the indecency provision of 18 U.S.C. § 1464 had never been "authoritatively construed" (Pet. App. A, 12), and left open the possibility that "obscene" and "indecent" have distinct meanings in the broadcast medium. The majority could only agree that the Commission's order was overbroad and vague, in violation of the no-censorship provision of the Communications Act, 47 U.S.C. § 326. Despite the fact that the Commission's holding was based upon a specific complaint and limited to the facts complained about, the court of appeals read the order broadly as if it applied to facts, circumstances and arguments that were not before the Commission. However, as Judge Leventhal pointed out in dissent, the following particular considerations were critical to the Commission's holding:

> —the words were broadcast "in the early afternoon . . .
> —when children were undoubtedly in the audience."
> —the words were "pre-recorded"
> —the words were "repeated over and over"
> —the words were "deliberately broadcast."

(Pet. App. A, 72). Accordingly, the Commission held that the language "*as broadcast* was indecent." (Emphasis added). This finding necessarily included the limitation of time and manner of presentation. (Judge Leventhal Dissenting, Pet. App. A, 54–56).

The Commission agrees with Judge Leventhal that the declaratory order should have been read narrowly. That order addressed a specific set of facts. When the Commission and the Courts are confronted with a different set of facts, they can then determine whether the principles announced in this order

should be applied, modified or extended.[11] There is "no constitutional impediment either to an agency determination in the first instance, or to its use of an approach much like that used by the courts, disposing of particular cases presented with an indication of underlying principles—so long as there is judicial review." (Judge Leventhal Dissenting, Pet. App. B, 53). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367; *Yale Broadcasting* v. *FCC*, 478 F. 2d 594.

CONCLUSION

In its declaratory ruling and in petitioning for certiorari, the Commission is seeking to give discrete meaning to the word "indecent," which appears in a statute of Congress. The statute applies only to the broadcast medium, which is different for a variety of reasons from other modes of expression and therefore warrants different treatment. Advocates of the widest freedom of expression acknowledge the existence of other competing interests, including the interest in protecting children from exposure to certain offensive material. The FCC's narrow declaratory order in this case continued its attempt to reconcile these competing interests in the broadcast context. We respectfully request this Court to review the opinion of the court of appeals, which simply did not come to grips with concerns that have troubled the Commission, Congress, broadcasters and the public for a considerable period of time.

Respectfully submitted,

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Acting General Counsel,
DANIEL M. ARMSTRONG III,
Associate General Counsel,
JOSEPH A. MARINO,
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Counsel,
Federal Communcations Commission,
Washington, D.C. 20554.

[11] This process had already begun with the Commission's partial reconsideration of the declaratory order. See 59 FCC 2d 892 (Pet. App. C, 93–96).

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FCC-75-1333
37716

December 4, 1975

IN REPLY REFER TO:

8320-H

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

The Trustees of the University of Pennsylvania
Radio Station WXPN(FM)
110 College Hall
University of Pennsylvania
Philadelphia, Pennsylvania 19104

Gentlemen:

This letter constitutes a Notice of Apparent Liability for forfeiture issued under Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. 503(b)(2), pursuant to Section 503(b)(1)(E) of the Act, 47 U.S.C. 503(b)(1)(E).

THE FACTS. Radio Station WXPN(FM), Philadelphia, Pennsylvania, licensed to the Trustees of the University of Pennsylvania, originated in the fall of 1974 a "live" program called The Vegetable Report which was broadcast weekly from its studios. The Vegetable Report, described by the station's FM Program Director as a "free-form music, call-in and chatter" type of program, was broadcast on Monday evenings between the hours of 4:00 p.m. and 7:00 p.m., but on occasion ran until 7:30 p.m. or later. The program was moderated by three University of Pennsylvania students who were members of the WXPN(FM) staff and who were joined occasionally by a Temple University student. On January 20, 1975, the following excerpts were broadcast during The Vegetable Report between approximately 6:15 p.m. to 7:15 p.m.:

Male announcer:	-- on the air.
Female caller:	Kiss my pussy, you dog you -
Male announcer:	You're beautiful! You're a poet!
Female caller:	Suck my pussy, you motherfu--
Male announcer:	You're a poet! Don't hang up - keep going.
Female caller:	Suck out my ass. Get a straw and strip it to the bone and suck out that motherfucker.
Male announcer:	Wow!

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Female caller: . . .thirteen year old son, you white fucker. Robbing and raping and they don't even know how to fuck. They're taking after your motherfucking --

Male announcer: I apologize for the dead air, but that's one way of dealing with poet on the 'phone. . .(Pause). . .You're magnificent! . . .I never - I really -- No, seriously, your command of the language is fantas--. . . Say something?

Second male announcer: I can't really hear her anymore now.

Male announcer: Hello. Hi. . .Hi. . .Well. . .(Pause). . . That was a little kid who said that.

Second male announcer: She still talking?

Male announcer: Yeah, can you hear her?

Second male announcer: No, I can't hear her.

Male announcer: Can you hear her now?

Second male announcer: No, I could only hear what was on key.

Female caller: You incorinated (phonetic) mammy -- you bastard you --

Male announcer: The way they're cussing, I don't know if I ought to put them on the air.

Second male announcer: Naw, you'd better not, really.

Male announcer: Suck a bloody Kotex?. . .Well, she hung—. . . Suck a bloody Kotex. . .That's really some — You repeated yourself.

Male announcer: WXPN, You're in-- You're on the air.

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Male caller: If you bought your clothes from Kraft Brothers, you got fucked up the ass sideways. . . . (Laughter). . .

Female caller: Yeah, it's really boring. It's a boring game.

Male announcer: Oh yeah, beating-off is much more fun.

Female caller: Oh, definitely.

Male announcer: What's the difference between a talking dog and a person?

Second male announcer: I don't believe I said there was a difference.

Male announcer: I just wanted to know.

Second male announcer: I don't see much, except that dogs usually squat to piss. . . .(Laughter). . .

Male caller: I want you to know that Cornplant and I saw the wave of the future this afternoon.

Male announcer: Yeah.

Male caller: We stopped into one of the porno stores on Market Street and we saw there the "Greek Goddess" -- Not just two holes, but three -- $29.95 rubber doll --

Male announcer: You mean in the mouth, in the butt, and between the legs?

Male caller: That -- As the man in the store described it -- "Not only has she got a mouth and a cunt, but she's got an asshole too." . . . (Laughter). . .

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Male announcer: WXPN, You're on the air.

Male caller: Hi, this is Chris and I go to William Penn and I need a fuck.

Male announcer: Yeah -- Well, tough luck to you, fellow.

On January 27, 1975, the following excerpts were broadcast on WXPN(FM) in the period from approximately 6:45 p.m. to 7:30 p.m. during The Vegetable Report:

Male announcer: And also -- and also. . .a man once told Jay that he wanted to suck the titties Jay's got.

Female caller: Oh--

Male announcer: He said to him, "I want to suck them titties you've got." And Jay's got some titties! I wouldn't mind sucking them my own bad self.

Male announcer: WXPN. You're on the air.

Male caller: Yeah. Listen to this story. This guy goes into a store. He asks me-- I say-- he says, "I would like a head of lettuce." The lady says to him, she says, "We don't have any head of lettuce". The guy says, "I don't understand." So, the lady backs up and she says, "What do you get when you take the 't' out of tomato?" And the guy backs up and says, "Omato!" The guy says, "What do you get when you take the 'p' out of potato?" The guy backs up--

Male announcer: Says, "Otato"--

Male caller: "Otato!" Then the guy-- Then the lady finally says--

Announcer and caller simultaneously: "What happens when you take the 'fuck' out of tomatoes?"

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Male announcer: And she-- he says-- we-- That's right-- "There ain't no 'fuck' in tomatoes!" He says, "That's right, there ain't no 'fuckin' tomatoes!" Good-bye.

Male announcer: It makes your husband horny to hear you say "fuck"?

Female caller: . . .(Laughter). . .It does. . . .(Laughter)

Male announcer: There's a lot of guys-- How old is your husband?

Female caller: There's-- How old is he?

Male announcer: Yeah.

Female caller: Oh, thirty. . .three.

Male announcer: You know, there's a lot of guys who really get hot-- Does your husband like you to talk dirty in bed when you're fucking?

Female caller: He tells me he doesn't, but I don't believe him. . . .(Laughter). . .

Male announcer: He's lying through his teeth - he loves it!

Female caller: How's my son?. . .(Laughter). . .Oh, thank you, I'm glad you finally answered. I mean one time I was-- I had the 'phone ringing for twenty minutes-- and then-- uh-- then I had to go down to see my son-- uh-- 'cause I won't put the radio on downstairs because I don't want--

Male announcer: 'Cause you don't want him to hear what we say?. . .(Laughter). . .We'd be such an education for your kid. It'd be so healthy for him to hear the things that we're saying--

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Female caller:	I was--
Male announcer:	Because if your kid listens now he won't ever be satisfied with the shitty radio that they put out.
Female caller:	He wants to talk to you.
Male announcer:	Well, put him on.
Female caller:	Okay, say "hi", Johnny. Say "hi".
Male announcer:	Hello.
Child:	Hi. Who are you?
Male announcer:	I'm David. Who are you?
Child:	I. . . .
Female caller:	He said, "Who are you?" He said, "Who are you?"
Child:	Johnny.
Male announcer:	Johnny. How old are you, Johnny?
Child:	Three.
Male announcer:	Johnny, can you say "fuck"?
Female caller:	Oh-- you son of a gun, you! . . .(Laughter) . . .You should have seen the look on his face!
Male announcer:	Look, let me tell you something --
Female caller:	Oh!
Male announcer:	If you son listens to this show-- If your son listens to this show-- where there's good radio-- where people say words that other people are afraid to say-- when he listens to other AM and FM he won't be satisfied. We're building the vanguard of the 1980 revolution right now. When your kid is twenty--

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Second male announcer:	David, she wants-- She's trying to say something.
Male announcer:	What? I'm sorry.
Female caller:	That's something else I wanted to say. All these people that-- you know, they're against your show and they-- they want to change it and all this kind of stuff-- You know it's very simple to change your dial if they don't like it.
Male announcer:	Exactly. They can all screw-off.
Female caller:	They can just -- Well, yeah, they can do that, too. But, I mean like-- uh-- like this is an accident. ...(Laughter)...
Male announcer:	Hey, listen, do you-- do you--
Female caller:	—too, on the radio. Really, it was.
Male announcer:	Do you want to tell us--
Female caller:	--able to shut the radio off.
Male announcer:	Do you want to tell us your name? I think you should call us every week. What's your name?
Female caller:	No, I can't.
Male announcer:	Well, do you want to make up-- you want to make up a name?
Female caller:	Uh-- Uh-- Sarah Bernhardt. How's that?
Male announcer:	I like "Orange peel" better.

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Female caller: "Orange peel". That's kind of cute. I like that.

Male announcer: All right.

Female caller: "Orange peel". But, I don't know if I will-- Oh, gosh. . .

Male announcer: Listen, you should call us more often and you should let your son listen to it, and you should teach your son that for him to beat-off at his age is good-- for him to say "fuck" is good-- for him to want to go to bed with you is healthy-- for him to want to screw you, a la cetera, is healthy--

Female caller: You know, he-- he does want to go to bed with me.

Male announcer: Oh, you should give him all the physical attention you can give him now, so he won't be starved for it and go out raping later.

Female caller: Oh, he gets plenty of physical attention. I mean he-- he--

Male announcer: When was the last time you blew him?

Female caller: What?

Male announcer: When was the last time you blew him?

Female caller: Blew who?

Male announcer: Your son.

Female caller: Oh, get ass!. . .(Laughter). . .You must be. . .(inaudible).

Male announcer: You can't draw lines like that-- If--

Female caller: Yes, I can. . . .(Laughter). . .He said a bad thing, Johnny. I'm not going to tell you.

Male announcer: Yeah. . . .(Laughter). . .Just show him. Just show him, don't tell him. Just, you know, show him. You don't need to tell him once you start showing him.

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Female caller: I think-- Well, he's asking questions already.

The foregoing are representative and illustrative of the type of material presented in these two broadcasts. On January 28, 1975, the Director of Student Activities, University of Pennsylvania, notified the WXPN(FM) Station Manager and FM Program Director by telephone and letter that much of the material broadcast during the January 27 program of The Vegetable Report violated any reasonable standard of public broadcasting; that the incident along with others made it evident that the WXPN staff was incapable of managing the station in a responsible manner; that on behalf of the University, he was mandating that the show in question be immediately and permanently taken off the air; and that he was placing the station on notice that the airing of such material in the future would result in an immediate suspension of broadcast operations. On March 5, 1975, the President of the University of Pennsylvania issued a statement which indicated that acting under the authority invested in him by the Trustees he was temporarily vesting authority for the management and operation of the station in the Director of Student Activities and suspending the present constitution of the station; that the authority of the Director of Student Activities, until approval of a new constitution for WXPN, included the right to issue standards for broadcast material, appoint and remove all station officers and exclude any student from participation in station activities, including broadcasting; and that he would appoint an ad hoc committee composed of faculty, administrators, and students to work with the Director of Student Activities and the Student Activities Council to recommend to the President and Trustees a new constitution. Subsequent correspondence with the Commission from University administrators and the Trustees indicated that further corrective action had been taken with regard to the operation of the station that included a temporary set of programming guidelines; limitations on the use of non-University personnel; inquiries into the availability and cost of tape monitoring services; the suspension of the three University of Pennsylvania students involved in The Vegetable Report from the station staff and broadcasting for the remainder of the school year; the permanent barring of the Temple University student involved in The Vegetable Report from the station; the appointment of the President's ad hoc committee referred to in his statement of March 5, 1975; the establishment of a Trustees' Subcommittee for Electronic Communications Media; the establishment of a Board of Overseers for WXPN to formulate guidelines on programming, engineering, staffing, financing, and future development of the station; and appointment of a Faculty Advisor for WXPN(FM) to be a ready resource to the officers and staff of the station. Mr. Donald T. Regan, Chairman, Trustees of the University of Pennsylvania, stated on behalf of the Trustees in a letter dated October 8, 1975, in response to

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a Commission inquiry that the Trustees do not consider the programming reflected by the transcript of excerpts from The Vegetable Report to be consistent with the programming policy of any responsible station, particularly a station operating in a University community, and that they are confident that the broadcasts were an aberration, resulting from the thoughtlessness and brash actions of a few unrepresentative persons.

DISCUSSION. Despite corrective action which the licensee states was taken after these broadcasts occurred, the licensee is apparently liable for violation of Section 1464 of Title 18 of the United States Code 1/ for broadcasting obscene and indecent matter. Section 503(b)(1)(E) of the Communications Act authorizes the imposition of a forfeiture against broadcast licensees who violate Section 1464. The Commission's position with respect to the broadcast of obscene or indecent matter has previously been clearly set forth. See Sonderling Broadcasting Corp., 27 RR 2d 285, recon. denied 41 FCC 2d 777 (1973), affirmed sub nom. Illinois Citizens Committee for Broadcasting, et al. v. FCC, 515 F.2d 397 (D. C. Cir. 1975), petition for rehearing denied March 13, 1975; Eastern Educational Radio (WUHY-FM), 24 FCC 2d 408 (1970); and In re Citizen's Complaint against Pacifica Foundation Station WBAI(FM), FCC 75-200, adopted February 12, 1975, 32 RR 2d 1331. At least the following four particular segments of the January 27, 1975, broadcast of The Vegetable Report appear to be obscene under the threefold test set forth by the U. S. Supreme Court in Miller v. California, 413 U. S. 15 (1973):

(1) Male announcer: You know, there's a lot of guys who really get hot--Does your husband like you to talk dirty in bed when you're fucking?

(2) Male announcer: Johnny, can you say "fuck"?

(3) Male announcer: Listen, you should call us more often and you should let your son listen to it, and you should teach your son that for him to beat-off at his age is good--for him to say "fuck" is good--for him to want to go to bed with you is healthy--for him to want to screw you, a la cetera, is healthy--

(4) Male announcer: When was the last time you blew him?

Female caller: Blew who?

Male announcer: Your son.

1/ Section 1464 reads: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

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The Commission believes that these particular segments appear to appeal to the prurient interest, describe sexual conduct in a patently offensive way, and lack serious literary, artistic, political, or scientific value. We note that the Court in Illinois Citizens Committee, supra, at page 406, indicated that it would not be inappropriate for the Commission to evaluate a broadcasting program that is episodic in nature with a cluster of individual and typically disconnected commentaries such as a call-in program of this type. We believe that these segments of the January 27 broadcast appear to present a pandering approach to explicit descriptions of ultimate sexual acts. Furthermore, the broadcast not only occurred at a time of the day when children might be expected to be present in the listening audience 2/, but at one point apparently involved a three-year-old child directly in the discussion.

These two broadcasts of The Vegetable Report also appear to have been indecent under the then prevailing standard regarding indecent language set forth in the WUHY case, supra, and the subsequent standard enunciated in WBAI, supra, to comply with the Miller decision, supra. The Commission believes that the unique, intrusive nature of broadcasting whereby it comes directly into the privacy of the home, frequently without any advance warning of its content, coupled with the use of patently offensive language on the airwaves at a time when children can reasonably be expected to be in the listening audience requires administrative sanction. It appears that the use of such words as "motherfucker", "fuck", "piss", and "titties" during the two programs of The Vegetable Report described above are "indecent" in that they depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and were broadcast at a time when children may reasonably be expected to be in the audience (i.e., in the early evening). 3/

In view of the foregoing, we determine that, pursuant to Section 503(b)(1)(E) of the Communications Act of 1934, as amended, the Trustees of the University of Pennsylvania have incurred an apparent liability of two thousand dollars ($2,000).

The Trustees of the University of Pennsylvania are hereby notified that they have the opportunity to file with the Commission, within thirty (30) days of the date of receipt of this Notice, a statement in writing as to why they

2/ In re Citizen's Complaint against Pacifica Foundation WBAI(FM), supra, noted in paragraph 2 that Illinois Citizens Committee was the first judicial decision upholding the Commission's conclusion that the probable presence of children in the radio audience is relevant to a determination of obscenity.

3/ It appears that such words also violate the "indecent" standard set forth in WUHY, supra, in that they are utterly without redeeming social value when used in the context broadcast.

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should not be held liable, or if liable, why the amount of liability should be reduced or remitted. Any such statement should be filed in duplicate and should contain complete details concerning the allegations heretofore made by the Commission, any justification for the violations involved, and any other information which the Trustees of the University of Pennsylvania may desire to bring to the attention of the Commission. Statements of circumstances should be supported by copies of relevant documents where available. Upon receipt of any such reply, the Commission will determine whether the facts set forth therein are sufficient to relieve the Trustees of the University of Pennsylvania of liability, or to justify either reduction or remission of the amount of liability.

The Commission notes that in a Supplement to Opinion of November 20, 1974, the Court in Illinois Citizens Committee, supra, at page 406, stated, "Whatever the difficulty of determining the relevant community standards in a national context, we believe that the Commission must adopt, in its deliberations leading to any substantive determination of obscenity, approaches that provide, as nearly as possible, the functional equivalent of a jury determination of a clear community consensus that the material is lewd and offensive. In approaching this sensitive obligation, the Commission does not have the free hand of bureaucratic censorship." Accordingly, if the Trustees of the University of Pennsylvania file such a statement in writing as described above within the thirty (30) day period denying liability or do not file any such statement within that time period with respect to non-liability or facts and reasons why the forfeiture should be of a lesser amount, the Commission shall, prior to the issuance of any substantive determination such as an Order of Forfeiture, establish an appropriate proceeding to provide the functional equivalent of a jury determination with respect to determining the relevant community standards for the purpose of ascertaining whether the above excerpts broadcast during The Vegetable Report contain obscene and/or indecent matter violative of Section 1464 of Title 18 of the United States Code.

In accordance with our established procedure, we also state that if the Trustees of the University of Pennsylvania do not wish to file a statement which denies liability and, in addition, do not wish to avail themselves of the opportunity of a further administrative proceeding and further substantive determination in the matter, they may within thirty (30) days of the date of the receipt of this Notice, make payment of the forfeiture by mailing to the Commission a check, or similar instrument, in the amount of two thousand dollars ($2,000) drawn payable to the Treasurer of the United States.

BY DIRECTION OF THE COMMISSION

Vincent J. Mullins
Secretary

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